Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

OPPOSITION OF CBEYOND COMMUNICATIONS, LLC, ITC^DELTACOM COMMUNICATIONS, INC., KMC TELECOM III, LLC, KMC TELECOM V, INC., NUVOX COMMUNICATIONS, INC., XO COMMUNICATIONS, INC. AND XSPEDIUS COMMUNICATIONS, LLC

Cbeyond Communications, LLC ("Cbeyond"), ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom"), KMC Telecom III, LLC and KMC Telecom V, Inc. (collectively "KMC"), NuVox Communications, Inc. ("NuVox"), XO Communications, Inc. ("XO") and Xspedius Communications, LLC on behalf of itself and its operating entities (collectively "Xspedius") (hereinafter the "CLECs") hereby respond to the Federal Communications Commission's ("FCC's" or "Commission's") Public Notice regarding BellSouth Telecommunications, Inc.'s ("BellSouth's") Petition for Waiver of certain of the FCC's rules regarding Enhanced Extended Loops ("EELs").[1] Specifically, in its Petition, BellSouth seeks a "limited and temporary waiver" of the FCC rules that require BellSouth "to process orders under the revised commingling and service eligibility requirements" adopted by the Commission in paragraphs 579 and 597 of its *Triennial Review Order*

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[1] *Pleading Cycle Established for Comments on BellSouth's Petition for Waiver*, Public Notice, CC Docket Nos. 01-338, 96-98, 98-147, DA 04-404 (Feb. 18, 2004).

("*TRO*").[2] The CLECs respectfully request that the Commission deny BellSouth's Petition because BellSouth has failed to demonstrate unique facts and special circumstances that could justify waiver of the FCC's rules requiring incumbents, such as BellSouth, to permit commingling and to facilitate the conversion of special access circuits to functionally equivalent unbundled network elements ("UNEs"), and because a grant of a waiver based on the grounds BellSouth asserts would undermine the purpose of the rules adopted by the Commission in the *TRO*.

The FCC has the discretion to waive its rules "for good cause shown."[3] As federal courts have explained, "the FCC may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest."[4] Therefore, a "waiver from the Commission is appropriate if ***special circumstances*** warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule."[5] "The burden . . . falls on the petitioner . . . to demonstrate the unique facts on which the Commission may rely in considering whether a waiver would be in the public interest."[6] Here, BellSouth has failed to demonstrate any unique facts or special circumstances that could warrant a deviation from the FCC's EEL rules, as explained in detail below.

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2 *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98 & 98-147, *Report and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, 17342-43, 17354, ¶¶ 579, 597 (2003) (*"TRO"*); *BellSouth Petition for Waiver*, CC Docket Nos. 01-338, 96-98 & 97-147 (filed Feb. 11, 2004) ("BellSouth Petition").

3 47 C.F.R. § 1.3.

4 *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("*Northeast Cellular*"), *citing WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied* 409 U.S. 1027 (1972) ("*WAIT Radio*").

5 *Request for Waiver by Marin County Office of Education, San Rafael, California*, 17 FCC Rcd 22441, ¶6 (2002) (emphasis added).

6 *Federal-State Joint Board on Universal Service*, 17 FCC Rcd 3518, ¶4 (2002).

I. BELLSOUTH HAS FAILED TO IDENTIFY ANY UNIQUE FACTS THAT COULD JUSTIFY WAIVER OF THE EEL REQUIREMENTS ADOPTED IN THE *TRO*

BellSouth fails to demonstrate any special circumstances that warrant a deviation from the Commission's commingling and EEL conversion requirements adopted in the *TRO*.

BellSouth seeks a waiver "because the contract negotiation process has proceeded much faster in its region than anticipated by the *TRO*."[7] BellSouth also adds that "[g]ranting this temporary waiver will avoid wasting substantial resources likely from converting special access circuits to EELs before the states conclude their loop and transport impairment cases" and that such grant "will also avoid substantial inefficiencies from unnecessarily accelerating the implementation of ordering and provisioning systems for the revised EEL requirements."[8] As demonstrated below, none of these assertions are supported by credible evidence, and even if they were, not one of them alone or all of them together would justify grant of a waiver of the Commission's commingling and EEL conversion rules.

A. The Contract Amendment Process and the Transition to the Commission's New EEL Rules Does Not Appear to Be Progressing in the BellSouth Region More Quickly than the Commission Anticipated

Figures supplied by BellSouth do not indicate that contract negotiations are producing new interconnection agreements and contract amendments implementing the *TRO* EEL requirements more quickly than anticipated by the Commission or more quickly than in other ILEC service territories.[9] As an initial matter, it is important to recall that the Commission was fully cognizant that contract negotiations would take some period of time and recognized that the process could take as

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7 BellSouth Petition at 1.

8 *Id.* at 2.

9 BellSouth Petition at 6. *See also* Letter and Presentation from Jonathan Banks, BellSouth Corporation to Marlene Dortch, Secretary of the Federal Communications Commission, WC Docket No. 01-338 at 3 (Jan. 13, 2004). BellSouth's request for waiver is ironic, given that BellSouth argued that the Commission should have overridden the section 252 process and unilaterally change all interconnection agreements instantaneously. *See TRO,* ¶ 701.

long as what the Commission characterized as "the statutory maximum transition period of nine months".[10] Nowhere did the Commission express the view that such a transition period would apply in all or any instances. Indeed, the Commission expressly recognized that the nine-month period applied as a default rule for negotiations triggered in the absence of a change of law provision. Contrary to BellSouth's suggestion that the Commission believed that it was establishing a nine-month transition period, the Commission expressly stated that:

> We find that delay in the implementation of the new rules we adopt in this Order will have an adverse impact on investment and sustainable competition in the telecommunications industry. Therefore, to ensure that there is no undue delay in commencing the renegotiation of interconnection provisions, the effective date of the rules we adopt in this Order shall be deemed the notification or request date for contract amendment negotiations under this default approach.[11]

Thus, there is no basis for BellSouth's assertion that "[t]he Commission believed that, in practice, [the] transition period would be nine months."[12]

In any event, BellSouth admits that it is in most, if not all circumstances, operating outside the default rule, as its interconnection agreements typically contain change of law provisions.[13] What BellSouth does not share, however, is that it has exerted tremendous pressure on CLECs to adopt its proposed *TRO* amendments within 45 or 90 day timeframes. BellSouth's basis for doing so is that the change of law provisions in BellSouth interconnection agreements typically establish a 45 or 90 day period during which the parties must negotiate and may not take a dispute over proposed contract terms to a state commission for arbitration/dispute resolution. In letters accompanying and

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10 *TRO*, ¶703.

11 *Id.*

12 BellSouth Petition at 2.

13 *See Id.* at n.16.

following-up its massive *TRO* amendment[14] proposals, BellSouth erroneously represented the 45 and 90 day periods as deadlines for negotiating, despite the fact that the contracts contain no deadline for taking disputes over proposed amendments to a state commission for resolution. In light of this, it is not at all surprising that 16% of BellSouth's contracts (percentage based on BellSouth supplied figures) have now been amended as we enter the second half of BellSouth's – for FCC advocacy only – 9 month transition period.[15] However, it is surprising that BellSouth now comes running to the Commission for relief from a non-crisis that it has worked feverishly to create.

At bottom, it can hardly be said that amendments or new contracts representing a mere 16% of the total number of contracts represents a tide too swift or dangerous – or unique or unanticipated. Moreover, BellSouth makes no attempt to demonstrate whether the carriers in those new or amended contracts actually are operating or whether they have any special access circuits in place that may be subject to commingling or conversion.

Finally, BellSouth's feeble attempt to tie its request for relief to the ongoing nine-month loop and transport impairment cases is without merit.[16] BellSouth has yet to demonstrate that it is entitled to loop or transport unbundling relief in any instance, let alone in the specific instances cited in its Petition.[17] Moreover, BellSouth has made no attempt to limit its request for relief to the Florida routes it believes it will successfully demonstrate a lack of impairment. Not that such limitation would bolster BellSouth's case, as BellSouth ignores the fact that even in cases where an unbundling

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[14] BellSouth's massive *TRO* amendment proposal seeks to do far more than implement the change of law ushered in by the *TRO*. Indeed, BellSouth proposes a wholesale replacement of its UNE and OSS-Ordering/Provisioning attachments, regardless of whether the *TRO* has any impact on particular terms (which in many cases, it does not). Moreover, the proposal contains several instances where BellSouth proposes language that seems designed to subvert and upend conclusions reached by the Commission in the *TRO*.

[15] Notably, in its *TRO* amendment, BellSouth proposes a 30-day period for transitioning to service arrangements that comply with the new *TRO* rules. BellSouth's insistence on such a provision highlights the audacious nature of its instant Petition.

[16] *See* BellSouth Petition at 3-4.

[17] *Id.* at 3.

requirement might be removed on a loop or transport route, a CLEC is still entitled to a commingled EEL and, as such, wholesale conversions back to special access remain a remote and unlikely proposition.[18]

B. BellSouth's Claim of Additional Investment is Unsupported and Unsubstantiated

To bolster its lackluster 9-month transition argument, BellSouth also makes unsupported and highly questionable assertions that waste will result in the absence of a grant of its waiver request. To wit, BellSouth claims that "[i]n certain circumstances, the absence of an appropriate transition is likely to result in significant stranded capital". BellSouth, however, fails to disclose its planned capital investment or how that capital investment relates to routes on which it expects unbundling relief. Moreover, BellSouth has utterly failed to demonstrate the need for any of the capital investment it claims may be needed. The asserted need to install new equipment for the purpose of creating separate UNE and non-UNE networks remains a mystery.[19] For example, BellSouth on page 4 of its Petition states:

> In particular, where current special access circuits consist of multiple legs at the same capacity level, and a carrier converts fewer than all the legs to UNEs, BellSouth anticipates that it would have to invest in equipment to delineate the UNE portion of the circuit from the special access circuit.[20]

It is noteworthy that BellSouth is asserting that it is this "particular" configuration that represents a problem. This configuration is a multi-point private line service. This configuration,

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18 BellSouth also ignores that fact that the running of the nine-month impairment cases is not the end point. In the event a state commission makes a finding of non-impairment, the state must allow a reasonable transition period when "de-listing" any transport routes. During such a transition period, CLECs must be afforded sufficient time to assess all possible options, including third-party provisioning and self-provisioning transport, in addition to ILEC special access transport as a replacement for the UNE transport. Moreover, many states have stayed their impairment proceedings in the wake of the D.C. Circuit's *USTA II* opinion. Thus, contrary to the FCC's conclusion that conversions should not be delayed, *TRO,* ¶588, BellSouth appears to be seeking relief for an undefined period of time.

19 *See* BellSouth Petition at 4-5, 7. In the *TRO*, the FCC rejected incumbent LECs' arguments that there must be separate UNE and non-UNE networks *See TRO*, ¶¶ 579-84.

20 *Id.* at 4.

however, seldom exists, if ever, among CLECs. Furthermore, high capacity circuits of this type require all legs to terminate at a digital cross connect system, which already enables a clear delineation (whether or not that is needed) for any legs that were converted to UNEs and would obviate the need for any capital investment. To take this rare circumstance and generalize that it applies everywhere and to everyone is disingenuous at best.

There should be no "stranded investment" for implementing a billing change to convert special access arrangements to EELs.[21] Moreover, BellSouth fails to explain why new equipment is needed to replace existing equipment performing the same functions. And, if a special access circuit miraculously passes multiple offices in a straight "home run" without passing through intervening equipment (as indicated by BellSouth's diagrams, *Ex Parte* at 9-11), it is not at all clear why that "home run" circuit would need to be destroyed for purposes of converting the circuit to a UNE. Thus, the need for BellSouth to "invest in equipment to delineate the UNE portion" of certain unspecified circuits from the "special access portion" remains speculative at best and there is no compelling need for the Commission to grant BellSouth relief based on assertions so speculative and doubtful in nature.

C. Inefficiencies Will Not Result in Unnecessary Implementation of Ordering and Provisioning Systems by BellSouth

BellSouth's assertion that a Commission failure to grant it a temporary waiver will create substantial inefficiencies from unnecessarily accelerating the implementation of ordering and provisioning systems for the revised EEL requirements is so hollow that BellSouth offers no support for it in its Petition. BellSouth does not disclose what processes or systems improvements it plans to implement or how it presently is being forced to accelerate the implementation of them. In considering Bellsouth's assertion, the Commission should be mindful that BellSouth has now for years

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21 *See TRO*, ¶588.

been required to convert special access circuits to EELs – the requirement is not new. In addition, BellSouth has for years offered commingled UNE and special access products in its interconnection agreements. Thus, the availability of commingled EELs is something that BellSouth has voluntarily offered well before such an offering was required by the *TRO*. Furthermore, the *TRO* merely changed the criteria for determining what loop/transport combinations qualify as UNEs; the obligation to convert circuits has been in place for years (at lease since the *UNE Remand Order*). Therefore, the *TRO* does not introduce a novel requirement that creates a new need for ILECs to revise their ordering/provisioning systems. In any event, the *TRO* has been in effect since October 3, 2003 and BellSouth had no reasonable basis to believe that – if any system changes were required to comply with the *TRO* – BellSouth could wait for the state cases to run their course. [22]

II. GRANT OF THE REQUESTED WAIVERS WOULD UNDERMINE THE PURPOSE OF THE COMMISSION'S EEL CONVERSION AND COMMINGLING RULES

The Commission concluded that the public interest would be served by adoption of the its *TRO* and the rules appended thereto. "...we believe that the certainty that we bring [with the *TRO*] will help stabilize the telecommunications industry, yield renewed investment in telecommunications networks, and increase sustainable competition in all telecommunications markets for the benefit of American consumers."[23] While the CLECs do not in all cases concur in that conclusion, they nevertheless respect that the Commission is entitled to make such decisions and that they stand until a court of law issues a mandate that says otherwise. With respect to commingling and the conversion of special access circuits to EELs or stand-alone UNEs, two requirements the CLECs strongly support,

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22 All this, however, is not to say that BellSouth has adequate or efficient processes for converting EELs and ordering commingled circuits. Several CLECs have complained about delays associated with BellSouth's conversion of special access circuits to EELs. Improvements to BellSouth's processes and systems likely would curtail some additional litigation. If BellSouth is planning to improve its processes and systems, there is no compelling reason to provide BellSouth with any incentive to delay.

23 *TRO*, ¶6.

the Commission expressly found that the public interest would not be served by extending a prohibition on commingling any further or by extending the so-called "safe harbors" previously applicable to conversions of special access circuits to EELs. Indeed, with respect to its new rules generally, the Commission found that "delay in the implementation of the new rules we adopt in this Order will have an adverse impact on investment and sustainable competition in the telecommunications industry."[24] BellSouth has not demonstrated why the public interest would be served by a reversal of any of these conclusions. Indeed, the benefits that might result from a grant of Bellsouth's waiver would appear to benefit BellSouth at the expense of competition, other competitors and consumers. Accordingly, BellSouth's request for relief is contrary to the public interest and must be rejected.

III. CONCLUSION

For the foregoing reasons, the CLECs urge the Commission to deny BellSouth's Petition.

Respectfully submitted,

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24 *TRO*, ¶70.